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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 199

EMPIRE OIL AND REFINING COMPANY, NOW KNOWN AS THE CITIES SERVICE OIL COMPANY, R. C. KETZLER,
Appellants,

vs.

DELLA FIELDS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

W. P. MORRISON,
HERBERT K. HYDE,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdction	1
Motion to dismiss	8

Table of Cases Cited.

Atlantic Refining Co. v. *Virginia*, 302 U. S. 22, 58 Sup. Ct. 75, 82 L. Ed. 24	6
Bivins v. *Board of County Commissioners of Wabaunsee County, Kansas*, 66 F. (2d) 351	6
Bohn v. *Better Biscuits, Inc.*, 78 Pac. (2d) 1177	6
Empire Oil & Refining Co. v. *Fields*, 181 Okla. 231, 73 Pac. (2d) 164	3
Fuller Brush Co. v. *Town of Green River*, 60 F. (2d) —	6
Metropolitan Casualty Insurance Co. v. *Brownell*, 68 F. (2d) 481	6
Power Mfg. Co. v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 Sup. Ct. 678	6
Rio Grande Western Railway Co. v. *Stringham*, 239 U. S. 44, 60 L. Ed. 136	5
Washington v. *Superior Court*, 289 U. S. 361	6

Statutes Cited.

Constitution of the State of Oklahoma, Article 9, Sec. 43	2
Rules of the Supreme Court of the United States, Rule 36	3
United States Code Annotated, Title 28:	
Section 344	2
Section 869	3
Section 874	3

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 28,791

EMPIRE OIL & REFINING CO., NOW KNOWN AS CITIES SERVICE OIL CO., A FOREIGN CORPORATION, AND R. C. KETZLER,

Appellants and Plaintiffs in Error,

vs.

DELLA FIELDS,

Appellee and Defendant in Error.

STATEMENT OF APPELLEE AND DEFENDANT IN ERROR AGAINST THE JURISDICTIONAL STATEMENT OF THE APPELLANTS AND PLAINTIFFS IN ERROR FILED HEREIN AND MOTION BY APPELLEE TO DISMISS APPEAL.

Comes now the appellee and defendant in error, Della Fields, in the above-styled and numbered cause and files this statement setting up grounds against the jurisdiction of the Supreme Court of the United States to review this cause on appeal as asserted by the appellants and plaintiffs in error.

1. The appellants fail to point out in their jurisdictional statement, the Oklahoma State Constitutional provisions

involved in this appeal, Article 9, Sec. 43 of the Constitution of Oklahoma reading as follows:

> "No corporation, foreign or domestic, shall be permitted to do business in this state, without first filing in the office of the corporation commission a list of its stockholders, officers and directors, with the residence and post office of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the state, designate an agent residing in the state; and service of summons or legal notice may be had on such designated agent and such other agents as are now or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise."

And this appellee points out to the court that the provisions of 28 U. S. C. A. 344, giving the United States Supreme Court jurisdiction to review decrees of State courts only gives said court jurisdiction to review decrees of State courts where a statute of any State is repugnant to the laws of the United States.

And appellant respectfully shows the court that the Constitution of Oklahoma having been adopted by the people of the State of Oklahoma as approved by the Enabling Act of Congress is not subject to review by the Supreme Court of the United States; or, if this appellee is mistaken in this contention, that nevertheless, the constitutional provision above quoted should be incorporated along with the venue statutes of Oklahoma in the jurisdictional statement of the appellants.

2. This appellee further objects to the allowance of this appeal for the reason that no superseadeas bond or security

for costs has been ordered as required by Rule 36 of the Rules of the Supreme Court of the United States and as is required by the provisions of the laws of the United States as found in 28 U. S. C. A. 869 and 874. The order allowing the appeal merely recites that the supersedeas bond heretofore filed in the State trial court shall remain in full force and effect and this appellee respectfully shows to this Court that the opinion of the Supreme Court of the State of Oklahoma granted judgment in favor of appellee and against the Hartford Accident & Indemnity Company which was the surety on the supersedeas bond filed in said State trial court so that the appellants and their surety on their supersedeas bond are all judgment debtors to the appellee.

3. In their jurisdictional statement filed in this cause, the appellants have failed to plainly disclose how and when the decision of the State Supreme Court was disposed of. The original opinion on the first appeal of this cause to the State Supreme Court is the opinion which took up and disposed of the venue question; said opinion being rendered on the 15th day of June, 1937 and styled *Empire Oil & Refining Co., et al.* v. *Della Fields,* and reported in 181 Okla. 231 or 73 Pac. (2d) 164, and in said opinion it was held in the second syllabus by the court as follows:

> "Sec. 125, OS 1931 (18 Okla. St. Ann. Sec. 471) which places the venue of certain actions, among other places, in the county where a foreign corporation has an agent for service, does not discriminate against foreign corporations because it results in giving venue to transitory causes of action in Oklahoma County where by law all foreign corporations are required to maintain service agents. The requirement of law that such service agents be appointed and maintained is a legal one, and the venue thus established bears a reasonable relation to the affairs of the corporation."

And in the body of the opinion under date of June 15, 1937 dealing with this venue question, the State Supreme Court has the following to say:

"We think there is no discrimination between foreign and domestic corporations in the constitutional sense. The venue of transitory actions against domestic corporations is limited, (1) to the county where it is situated, or has its principal office or place of business, (2) or where its principal officers reside or may be served, (3) where the cause of action of some part thereof arose. Section 112, O. S. 1931 (12 Okla. St. Ann. Sec. 134). The venue of transitory actions against foreign corporations is (1) where plaintiff resides, (2) where corporation has its principal office or place of business, (3) or has property, or (4) where it has an agent appointed for service. Section 125, supra.

"In this case it is alleged that since defendant, a foreign corporation, must appoint a resident of the capital city as its agent for service of process, it results that all transitory actions have a venue there. We do not understand the Federal cases (Power Mfg. Co. *v.* Saunders, 274 U. S. 490, 47 S. Ct. 678, 71 L. Ed. 1165, and Bain Peanut Co. *v.* Pinson, 282 U. S. 499, 51 S. Ct. 228, 75 L. Ed. 428) to hold that there may not be a difference in the venue prescribed, but only that there may not be a discrimination. The respective venues prescribed must bear a reasonable relation to the business. It must find its basis in the establishment which a foreign corporation has set up in this state. *Since a domestic corporation must be domiciled in this state,* and have an abode, it naturally results that every transitory action may be brought in that county. *Since a foreign corporation may never acquire an abode here,* the state has chosen to require all of them to establish one in Oklahoma county. We can see no prejudice to them in the type or character of service, and that venue may also result therefrom is not discriminatory in our opinion. See Phillips Pet Co. *v.* Smith, 177 Okl. 539, 61 Pac. (2d) 184, 107 A. L. R. 858."

All law questions were disposed of in the said opinion of June 15, 1937, but the decision reversed the case for a new trial on purely an evidential question. The present opinion and decision of the Supreme Court of the State of Oklahoma under date of November 26, 1940, which is given as the only decision appealed from, merely affirmed the judgment below on the venue question on the ground that its former decision was the law of the case in that respect. The eleventh syllabus of the opinion of November 26, 1940, reads as follows:

> "A decision of this court upon questions of law on a former appeal between the same parties concerning the same subject matter becomes the law of the case and is ordinarily controlling in this court upon a subsequent appeal."

The Supreme Court of the United States in the case of *Rio Grande Western Railway Co., plaintiff in error* v. *Thomas B. Stringham, et al.*, 60 L. Ed. 136, 239 U. S. 44, in the second syllabus provides as follows:

> "A decision of the highest state court, which on a second appeal, affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the Federal question relied upon to confer jurisdiction was involved in the first decision, and that was final, in the sense of the Judicial Code, Section 237 governing writs of error to state courts."

And the State Supreme Court in the body of the opinion appealed from herein has the following to say with reference to the venue question:

> "Defendants contend that the venue was not properly laid in Oklahoma County. This matter was settled in the former opinion and is the law of the case."

This Federal question now raised by the appellants, along with all other legal questions, was disposed of in the first

appeal hereinabove referred to, the opinion of which is dated June 15, 1937. The present opinion, which appellants are appealing from, treats the law of the former opinion as the law in the present appeal and only deals with procedural questions, and the admissibility and rejection of certain evidence and the giving of certain instructions based upon said evidence.

4. The appellants, in their jurisdictional statement in the sixth numerical paragraph thereof, cite the following cases which they sustain the jurisdiction of the United States Supreme Court:

Power Mfg. Co. v. *Saunders,* 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678;
Bohn v. *Better Biscuits, Inc.* (Cal.), 78 Pac. (2d) 1177;
Atlantic Refining Co. v. *Virginia,* 302 U. S. 22, 58 S. Ct. 75, 82 L. Ed. 24;
Washington v. *Superior Court,* 289 U. S. 361, 365;
Metropolitan Casualty Insurance Co. v. *Brownell,* 68 F. (2d) 481, 483 (C. C. A. 7th);
Bivins v. *Board of County Commissioners of Wabaunsee County, Kansas,* 66 F. (2d) 351 (C. C. A. 10th);
Fuller Brush Co. v. *Town of Green River,* 60 F. (2d) (D. Ct., Wyo.).

but this appellee respectfully calls attention of the Court to the fact that these cases do not deal with or involve venue questions which are in any way similar to the venue laws of the State of Oklahoma as is pointed out by the Supreme Court of the State of Oklahoma in its original opinion of June 15, 1937 and reported in 73 Pac. (2d) 164 or 181 Okla. 231, and quoted *supra.*

In the case of *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678, cited and relied upon by the appellants was dealing with a venue statute in Arkansas

which apparently permitted suits to be filed against foreign corporations in any county of the State of Arkansas regardless of where it had agents upon whom service of summons might be had. Under the laws of Oklahoma, a foreign corporation is not required to maintain an office or place of business in the State as is required of domestic corporations, so, in lieu of such a requirement of foreign corporations, they are required to maintain a service agent in the capital city of Oklahoma City. And under Oklahoma statutes, as well as under the common law, a transitory action may be filed and venue had in any county where a good and valid service of summons may be had, which rule applies alike to both foreign and domestic corporations. Since a foreign corporation is not required to maintain a place of business in the State of Oklahoma in order to do busines in said State, it is obvious that there must be some definite way of obtaining service. A foreign corporation is therefore required to nominate and appoint a service agent. This is not necessary in the case of a domestic corporation, because a domestic corporation must, under Oklahoma law, maintain a principal place of business in the State. And the opinion of the Supreme Court of the United States in the *Power Mfg. Co.* case relied upon by the appellants, states in the body of the opinion as follows:

> "It does not prevent a state from adjusting its legislation to differences in situations, or forbid classification in that connection, but it does require that the classification be not arbitrary, but based upon a real and substantial difference, having reasonable relation to the subject of the particular legislation. (Citing cases.)
>
> "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic

corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made."

So, it will be seen from a casual examination of the Oklahoma laws complained of by appellants, and the cases cited by appellants and relied upon to sustain the jurisdiction of the Supreme Court of the United States, that the classification of foreign corporations by the Constitution and statutes of Oklahoma is not an unreasonable or arbitrary classification, but is based upon reasonable and substantial grounds and does not deny to foreign corporations the equal protection of the laws of the State of Oklahoma.

Motion to Dismiss.

In view of the statements and things contained in the above and foregoing statement, the appellee respectfully moves that this appeal to the Supreme Court of the United States be dismissed for the reason that it is without any merit and is based wholly upon frivolous grounds.

HERBERT K. HYDE,
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Attorneys for Appellee and Defendant in Error.